

EXHIBIT O

United States Court of Appeals
for the Northern District of California

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7 IN THE UNITED STATES DISTRICT COURT
8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11 United States of America,

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12 Plaintiff,

13 v.
14 LUKE BRUGNARA, BRUGNARA
15 CORPORATION,
16 Defendants.

17 APPLICATION FOR PERMISSION TO
18 ENTER PLEA OF GUILTY AND ORDER
19 ACCEPTING PLEA
20 (Fed. R. Crim. P., Rules 10 and 11)

21 The defendant represents to the Court:

22 1. My full true name is Luke D. Brugnara. I am 46 years of
23 age. I have gone to school up to and including graduated College of Law. My
24 most recent occupation has been real estate - buying & selling. I
25 request that all proceedings against me be in my true name.

26 2. I am represented by a lawyer; his/her name is

27 Harris A. Taback.

28 3. I received a copy of the Indictment/Information (as used in the Application the
term Indictment includes Information) before being called upon to plead. I have read the
Indictment or a translator who speaks _____ read it to me, and I have
discussed the indictment with my lawyer.

1 I fully understand every charge made against me. I understand these charges to
2 be:

3 18 USC Sec 1001 (2 counts - false statements to
4 law enforcement); 16 U.S.C. 1538(a)(1)(a) and
5 1540 (b)(1)(f) counts - Endangered Species Act Violations

6 4. I have told my lawyer all the facts and circumstances known to me about the
7 charges made against me in the Indictment. I believe that my lawyer is fully informed on
8 all such matters.

9 5. I know that the Court must be satisfied that there is a factual basis for a plea of
10 "GUILTY" before my plea can be accepted. I represent to the Court that I did the following
11 acts in connection with the charges made against me in Counts

12 On March 24, 2007 I falsely told Warden Kroll that I did
13 not attempt to fish for
14 steelhead when in truth I did attempt
15 to fish for steelhead. I also falsely told Warden Kroll that I fished
16 (In the above space defendant must set out in detail in his/her own handwriting what
(continues on attached sheet)
he/she did. If more space is needed, add a separate page.)

17 6. My lawyer has counseled and advised me on the nature of each charge, all
18 lesser included charges, all penalties and consequences of each charge, all possible
19 defenses that I may have in this case and the constitutional rights I am waiving.

21 7. I understand that my constitutional rights are as follows:

- 22 (a) the right to a speedy and public trial by jury;
- 23 (b) the right to see all of the evidence against me and to hear all
24 witnesses called to testify against me and to have my attorney cross-
examine them;
- 25 (c) the right to use the power and process of the court to compel the
26 production of any evidence, including the attendance of any witnesses
in my favor;
- 27 (d) the right to the assistance of a lawyer at all stages of the proceedings
28 Including trial and appeal and if I cannot afford one, to have the court
appoint one to represent me without cost to me or based upon my
ability to pay;

with a "top water floating frog lure" when (47) 20
in fact I fished with a castmaster treble hook for
the Steelhead.

I admit that I closed the portal at
my dam on or about January 11, 2007 knowing
that Steelhead needed to migrate upstream of the
dam. The dam remained closed through January of 2008.

I also failed to maintain the fish ladder in
an operable condition and failed to install the flash
board barrier throughout the period of January 11, 2007
through May, 2007. I also trapped the Steelhead in a pool
below the dam with a man made stick dam from March 14-24, 2007.
I acknowledge that this caused a take
of the Steelhead.

On March 23, 2007, I fished for and
attempted to fish for Steelhead located in the
pool below my dam with a cast master treble
hook.

- 1 (e) the right to remain silent or to take the witness stand at my sole option
- 2 and if I do not take the witness stand, no inference of guilt may be
- 3 drawn from such failure and the jury must be so advised;
- 4 (f) the right against self-incrimination;
- 5 (g) the right to appeal from an adverse judgment;
- 6 (h) the right to appeal my sentence without any limitation contained in my
- 7 plea agreement.

8. I know that I may plead "NOT GUILTY" to any offense charged against me and exercise all of my rights as listed above.

9. I know that if I plead "GUILTY" I am giving up all of the rights enumerated in paragraph 7 and that there will be no trial either before a court or jury.

10. I know that if I plead "GUILTY" the result of my plea is more than just an admission or confession of guilt and that it will result in my conviction, and that further, the court may impose the same punishment as if I had pleaded "NOT GUILTY," stood trial and been convicted by a jury.

11. My lawyer has discussed with me the maximum and minimum, if any, punishments which the law provides and the various provisions of the Sentencing Guidelines that may apply to me. I understand that the maximum punishment for the offense(s) charged in Count(s) I - IV of the indictment is ~~gain or loss~~^(which ever is greater) 6 months (each Count) years of imprisonment, a fine of \$ 25,000 (or twice the amount), and a period of 1 year supervised release. I understand that there is a mandatory minimum punishment of 0 years imprisonment for the offense(s) charged in Count(s) _____.

_____. I also understand that the minimum period of supervised release which the court may impose is _____ (If applicable) and that if I violate any condition of supervised release the release may be revoked and I may be sentenced to all or a part of the term of supervised release imposed in addition to any other term of imprisonment which I have received.

I understand that I may be assessed the costs of confinement and/or supervision. I understand that I must pay a penalty assessment of \$100.00 per count to which I plead (or \$25.00 in the case of misdemeanor counts). I understand that I may be ordered to pay

* Counts V-VI - Maximum 5 year prison term for each Count
a \$250,000 fine for each Count. Maximum 3 year Supervised Release.

United States District Court
For the Northern District of California

1 restitution in an amount determined by the court.

2 I know that the sentence I will receive is solely a matter within the control of the
3 Judge. I understand that the Judge will make no decision regarding my sentence until the
4 Judge has read and considered the pre-sentence investigation report prepared and
5 submitted to the court by the Probation Department.

6 I also understand that the court and counsel cannot promise what sentence or
7 sentencing range will be set and that these calculations will depend upon the Sentencing
8 Guidelines as they apply to me.^{which I have been told is 15 mo. - 21 months} I have been advised that the court may sentence within
9 the guideline range determined by the Probation Department or may depart upward or ^(if) ~~downward~~ ^(RB)
10 downward from the range. However, no promises have been made to me as to the range
11 or departure.

12 12. If I am on probation, supervised release or parole in this or any other court, I
13 know that by pleading guilty here my probation, release or parole may be revoked and I
14 may be required to serve time in that case, which may be consecutive, that is, in addition
15 to any sentence imposed upon me in this case.

16 13. I declare that no officer or agent of any branch of government (federal, state
17 or local) has promised or suggested that I will receive a lighter sentence, or probation, or
18 any other form of leniency, nor have any other promises been made if I plead "GUILTY,"
19 except as stated in the Plea Agreement I have signed, stated on the record in my entry of
20 plea or as follows: Sentenced by Judge Ats up in tax case first; No charges

*(AT)
(22)*
21 brought for that complaint or bankruptcy, fraud, or any other matters related
22 recommending concurrent time in ESA case with tax case, and that defendant
23 will be released to the custody of his mother, to reside at her residence 24/7, etc.
24 (in the space above insert any promises or concessions made to the defendant or to his/her attorney.)

25 on Friday Jan. 29 or Thur Jan. 30, 2011.
26 If anyone else made such a promise or suggestion, except as noted in the previous
27 sentence, I know that person had no authority to do it. No one has forced or coerced me
28 into entering this plea. My willingness to plead guilty (does) ~~(does not)~~ result from prior
discussions between my attorney and the government's attorney. (If it does, state any
factors that influenced you that are not reflected in the plea agreement.)

*(AT) and if sentence is imposed the government agrees that the
defendant be permitted to voluntarily surrender to the designated ROPA facility.*

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5 14. I believe that my lawyer has done all that a lawyer could do to counsel and
6 assist me, and I am satisfied with the advice and help he/she has given me.

7 15. I know that the court will not permit anyone to plead "GUILTY" who maintains
8 he/she is innocent and, with that in mind and because I am "GUILTY," I respectfully
9 request the court to accept my plea of "GUILTY" and to have the clerk enter my plea of
10 "GUILTY" as follows: To Counts I - VI.

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14 16. My mind is clear. I am not under the influence of alcohol or drugs and I am
15 not under a doctor's care. The only drugs, medicines or pills that I took within the past
16 seven days are:

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(If none, so state.)

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17. I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF
18. MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET
19. FORTH IN THE INDICTMENT AND IN THIS APPLICATION AND IN THE CERTIFICATE
20. OF MY LAWYER WHICH IS ATTACHED TO THIS APPLICATION. IN OFFERING MY
21. PLEA OF "GUILTY" I FREELY AND VOLUNTARILY WAIVE (give up) THE
22. CONSTITUTIONAL RIGHTS GUARANTEED TO ME AS STATED IN PARAGRAPH 7
23. ABOVE.

1 18. I waive the reading of the indictment in open court, and I request the court to
2 enter my plea of "GUILTY" as set forth in Paragraph 15 of this application.

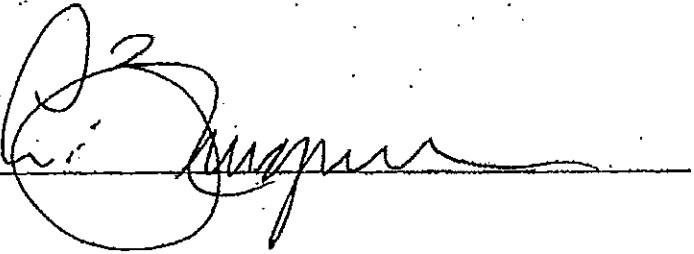
3 19. I understand that all of the above statements will be made in open court
4 under oath and that any false statements may be used against me in a prosecution for
5 perjury or false statement which is a felony.

6 20. I am proficient enough in English to read the above and have read
7 and fully understand it.

8 _____ I am not proficient enough in English. I speak and understand
9 _____ which is my native language. The above was read to me in
10 _____ and I fully understand it.

11 Signed by me in open court in the presence of my attorney this 26th day of

12 January, 2010.

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14 X

INTERPRETER CERTIFICATION

I, _____, hereby certify that I am a duly
Interpreter in the English and _____
languages and that I read all of the above to the defendant, that he/she stated he/she fully
understood it, and I am satisfied that his/her answer is true and correct.

Interpreter's signature

Date _____

CERTIFICATE OF COUNSEL

3 The undersigned, as lawyer and counselor for the defendant Luke D.

4 Dwight A. Ranch hereby certifies:

5 1. I have read and fully explained to the defendant and believe he/she fully
6 understands the allegations contained in the Indictment of this case, the defenses he/she
7 may have to each and every one of the allegations and the consequences of a plea of
8 "GUILTY," including the pertinent Sentencing Guidelines provisions and maximum and.
9 minimum penalties.

10 2. I believe the defendant fully understands the constitutional rights he/she is
11 waiving and that by entering a plea of "GUILTY" he/she is waiving each and every one of
12 those rights.

13 3. Nothing has come to my attention which causes me to believe that the
14 defendant lacks the ability to understand anything contained in the attached application or
15 that at the time of entering his/her plea he/she is under the influence of any drug or
16 alcohol.

17 4. The plea of "GUILTY" offered by the defendant in Paragraph 15 accords with
18 my understanding of the facts he/she related to me and is consistent with my advice to the
19 defendant.

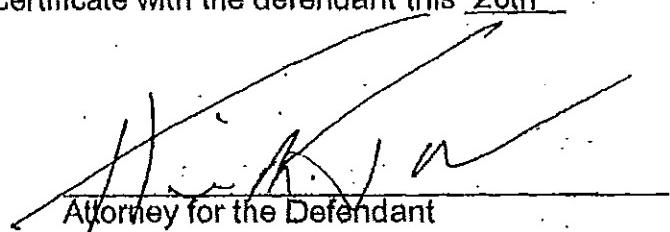
20 5. In my opinion the defendant's waiver of reading of the indictment in open
21 court as provided by Rule 10 is voluntarily and understandingly made, and I recommend to
22 the court that the waiver be accepted by the court.

23 6. Defendant has read the Plea Agreement she/he signed in the matter and I
24 believe she/he fully understands it. I certify that no promises have been made to the
25 defendant by the government or myself other than those contained in the Plea Agreement
26 and, if there are such other promises I must state them on the record before my client and
27 the court.

28 7. In my opinion the plea of "GUILTY" offered by the defendant in Paragraph 15

1 of the application is voluntarily and understandingly made. I recommend that the court
2 accept the plea of "GUILTY."

3 Signed by me In open court In the presence of the defendant above-named and
4 after full discussion of the contents of this certificate with the defendant this 26th
5 day of January 26, 2010.

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Attorney for the Defendant

United States District Court
For the Northern District of California

ORDER

I find that:

- 4 1. The defendant enters this plea of guilty freely and voluntarily and not out of
 - 5 ignorance, inadvertence, fear or coercion.
 - 6 2. The defendant understands and knowingly, freely and voluntarily waives his
 - 7 constitutional rights.
 - 8 3. The defendant freely and voluntarily executed the within Application and
 - 9 understands its contents.
 - 0 4. The defendant has admitted the essential elements of the crime charged.

IT IS THEREFORE ORDERED that the defendant's plea of "GUILTY" be accepted and entered as prayed for in the Application and as recommended in the certificate of his lawyer.

14 Done in open court this 26th day of January, 2010.

Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

EXHIBIT P

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6 IN THE UNITED STATES DISTRICT COURT
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9
10 UNITED STATES OF AMERICA,

No. CR 08-0222 WHA

11 Plaintiff,

12 v.

13 LUKE D. BRUGNARA,

14 Defendant.
15 ORDER VACATING GUILTY
PLEA AND SETTING CASE
FOR JURY TRIAL

16 Pursuant to a Rule 11(c)(1)(C) plea agreement, defendant Luke D. Brugnara pled guilty to
17 filing a false tax return for the year 2000 in violation of 26 U.S.C. 7206(1). He sold real estate in
18 2000 but knowingly failed to report the gain in his return for 2000. The plea was taken on
19 May 15, 2009, after the indictment had been pending for thirteen months. Defendant Brugnara
20 had retained counsel with an excellent reputation, was out of custody, and had had many months
21 to prepare for trial.

22 The plea was accepted on the eve of trial. The trial date was then vacated. After the trial
23 date was vacated, defendant Brugnara fired his lawyer and asked for a CJA lawyer to aid him in
24 rescinding his plea agreement. Of course, by that point, it was impossible to reinstate the trial
25 date, the calendar slots having been quickly consumed. New CJA counsel would have, at all
26 events, needed time to prepare anew.

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1 New counsel has now moved to vacate the plea and asks for a trial next year in February.
2 The standard governing such a motion appears in Rule 11(d)(2) and requires a "fair and just
3 reason for requesting the withdrawal" before sentencing.

4 Without doubt, the Ninth Circuit caselaw requires that leave to withdraw guilty pleas be
5 liberally allowed before sentencing. When, however, the *only* reason given for the request is
6 that the plea was not knowing and voluntary; then such a request can be denied when the Court
7 finds the plea was, in fact, voluntary and knowing. *United States v. Garcia*, 401 F.3d 1008, 1012
8 (9th Cir. 2005). After reading the transcript of the plea colloquy, the Court is convinced and so
9 finds that defendant Brugnara's plea was, indeed, knowing and voluntary. He admitted that he
10 was thinking clearly, among many other admissions relevant to the question. Yes, now he says
11 that he was under stress and apprehension when he pled guilty. That is almost always true for
12 every defendant who pleads guilty. Still, we expect defendants who plead guilty to manage
13 their anxiety, to focus clearly on the decision at hand, and to make a solemn and grave choice.
14 Defendant Brugnara assured the Court that he had done so and was thinking clearly at the time.
15 All agree that the plea colloquy was adequate. No claim of new evidence is made. No argument
16 is made that there have been intervening circumstances. All that is now claimed is that the plea
17 was the product of fear and stress and now defendant thinks, on reflection, that he should go to
18 trial. (It should be noted that in the process of asking for a CJA lawyer, defendant stated that
19 he had been misinformed by his prior counsel as to the effect of the "*Valentino*" decision, a
20 suggestion expressly no longer made by new counsel.¹ There was no contention of overwhelming
21 fear and stress. Now that is the sole contention.)

22 Although the foregoing plainly militates against the motion, *United States v. Rios-Ortiz*,
23 830 F.2d 1067, 1069 (9th Cir. 1987), the matter is still one within the Court's discretion.
24 *Garcia*, 401 F.3d at 1011. In exercising that discretion, there is a powerful practical

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26 ¹ The "*Valentino* ruling" appears to be a reference to *United States v. Valentino*, 19 F.3d 463 (9th Cir.
27 1994), where the defendant appealed his sentence after having pled guilty to a violation of 26 U.S.C. 7206(1)
28 (the same violation to which Brugnara has pled guilty in this action). In *Valentino*, the Ninth Circuit affirmed
the lower court's ruling that interpreted federal sentencing guidelines as requiring the defendant's sentence to be
calculated by the amount of under-reported income as opposed to the net loss to the federal government after
adjustments. *Id.* at 465 ("The purpose of the guideline rules is to measure the size of the loss, not the size of the
government's loss after all corrections in both directions").

1 consideration. The plea is pursuant to Rule 11(c)(1)(C). That means that if the ultimate sentence
2 varies from the range in the plea agreement, one side or the other would be entitled to cancel the
3 agreement and require a trial. Given the seriousness of the admissions and proffer already before
4 the Court, and given that the Rule 11(c)(1)(C) range is so much lower than the statutory
5 maximum, it is at least plausible that a higher sentence would be imposed, leading to a
6 cancellation of the plea and a trial delay even worse than were we to cancel the plea now.² This is
7 not to say that the sentence will necessarily exceed the plea agreement range. That could only be
8 decided after a fair and thorough sentencing process. But it is reasonable to say that we are
9 already facing a risk of a withdrawn plea due to the inherent nature of a Rule 11(c)(1)(C) plea,
10 the arguable leniency of the proposed sentencing range, and the seriousness of the circumstances
11 already stated to the Court. To exacerbate the situation, even if the Court sentences *within* the
12 plea agreement range, there would likely be an appeal of a refusal to vacate the plea, premised
13 on the circuit's policy of liberality. Finally, if the sentence were *below* the range, then the
14 government might well cancel the plea and sentence. Looking ahead, there are simply too many
15 avenues leading to yet more delay. The practical course is to try the case on the merits and as
16 promptly as practical.

17 If the plea had been an open plea, this consideration would not be present. Given the
18 contingencies under Rule 11(c)(1)(C), a practical course seems best in the discretion of the Court.
19 Trying the case on the merits seems best.

20 To be sure, the government has made an abstract claim of prejudice but has utterly failed
21 to support it. If the proposed plea range were rejected, it is worth adding that the case would have
22 to be tried, perhaps even much later, so any claim of prejudice must be trimmed to size in light of
23 this risk anyway.

24 For the foregoing reasons, the Court exercises its discretion to vacate the plea of guilty
25 entered on May 15, 2009, and hereby reinstates the not guilty plea previously entered. The jury
26 trial shall commence on FEBRUARY 1, 2010, AT 7:30 A.M. with a final pretrial conference on
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28 ² The guideline range is not known yet. It would be subject to application of the statutory sentencing factors at all events, such as the need for deterrence. 18 U.S.C. 3553.

1 **JANUARY 18, 2010, AT 2:00 P.M.** Given new counsel's need to come up to speed, the time
2 between now and the trial date shall be excluded under the Speedy Trial Act, the Court finding
3 the need for the continuance outweighs the need of the public or the defendant for a speedier trial.
4 (Please promptly prepare a written stipulation and order.) A status conference is hereby set for
5 **SEPTEMBER 22, 2009, AT 2:00 P.M.** Please do *not* present any more Rule 11(c)(C) pleas
6 although, of course, an open plea will always be entertained if seasonably made before trial.
7 Acceptance of responsibility may or may not be available depending on the timing and other
8 circumstances.

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10 **IT IS SO ORDERED.**

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12 Dated: September 2, 2009.

Wm Alsop
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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